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A

DISCOURSE

PRONOUNCED UPON

THE INAUGURATION OF THE AUTHOR,

AS DANE PROFESSOR OF LAW

IN

HARVARD UNIVERSITY,

ON

THE TWENTY-FIFTH DAY OF AUGUST, 1829.

BY JOSEPH STORY.

BOSTON:

HILLIARD, GRAY, LITTLE, AND WILKINS.

1829.

DISTRICT OF MASSACHUSETTS, *to wit.*

District Clerk's Office.

BE IT REMEMBERED, that on the twenty-sixth day of August, A. D. 1829, in the fifty-fourth year of the Independence of the United States of America, Hilliard, Gray, Little, & Wilkins, of the said district, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, *to wit* :

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JNO. W. DAVIS,

Clerk of the District of Massachusetts.

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DISCOURSE.

It has been customary in this university, for professors, upon their induction into office, to deliver a public discourse upon some topics suitable to the occasion. Upon the establishment of a new professorship it may also be expected, that he, who for the first time fills the chair, should give some account of the foundation, and of the studies, which it proposes to encourage. I shall endeavour not wholly to disappoint the just expectations of my audience in both respects ; premising, however, that much reliance must be placed upon their indulgence, since the subject affords little scope for elegant disquisition, and almost forbids those ornaments, which gratify the taste, and warm the imagination of the scholar.

My plan is, in the first place, to lay before you some considerations touching the general utility of the study of the law ; and to address them with more pointed application to those, who propose to make it the business of their lives. In the next place, I shall briefly unfold the nature and objects of the professorship, which I have now the honor to occupy, and the particular studies, which it comprehends ; so that the noble design of the founder may be amply vindicated, and receive, as it deserves, the public approbation. In proportion, however, to the value

and importance of these studies, I cannot but feel a diffidence, lest they should fail under my care of becoming as attractive and interesting as they ought; and that my own imperfect execution of duty should cast a shade upon the bright prospects, which the founder is opening to our view. In the present state of knowledge, such a diffidence might well become the teacher of any science; but the remark applies with augmented force to a science so vast, so intricate, and so comprehensive, as that of jurisprudence. In its widest extent it may be said almost to compass every human action; and, in its minute details, to measure every human duty. If we contemplate it in the highest order of subjects, which it embraces, it can scarcely be surpassed in dignity. It searches into and expounds the elements of morals and ethics, and the eternal law of nature, illustrated and supported by the eternal law of revelation. It is in this sense, that it has constituted the panegyric of philosophers and sages in almost every age. It is in this sense that Cicero has spoken of it, in a passage, which is upon the lips of every scholar: “*Est quidam vera lex, recta ratio, naturæ congruens, diffusa per omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando a fraude deterreat, quæ tamen neque probos frustra jubet, aut vetat, nec improbos jubendo, aut vetando movet. Huic legi nec abrogari fas est, neque derogari ex hac aliquid licet; neque tota abrogari potest. Nec vero, aut per senatum aut per populum solvi hac lege possumus.*” * It is in this

* Cic. Fragment. de Repub. 17 Ernesti. Cic. Op. 185 (Wells & Lilly). See also, Cic. de Legg. Lib. i. § 6.

sense, also, that the genius of Sir William Jones, rising into poetical enthusiasm, has proclaimed, that

“Sovereign law, the state’s collected will,
O’er thrones and globes elate
Sits empress, crowning good, repressing ill.”

But if we contemplate it in a narrower view, as a mere system of regulations for the safety and harmony of civil society ; as the instrument of administering public and private justice ; as the code, by which rights are ascertained, and wrongs redressed ; by which contracts are interpreted, and property is secured, and the institutions, which add strength to government, and solid happiness to domestic life are firmly guarded ;—if, I say, we contemplate it in this narrower view, its dignity may in some measure be lessened, but its design will yet appear sufficiently grand, and its execution sufficiently difficult, to have strong claims upon the gratitude and admiration of mankind.

The common law purports to be such a system of jurisprudence. By the *common* law is sometimes understood that collection of principles, which constitutes the basis of the administration of justice in England, in contradistinction to the maxims of the Roman code, which has universally received the appellation of the *civil* law. The latter has been adopted, or, if I may so say, inosculated, into the juridical polity of all continental Europe, as a fundamental rule. The former is emphatically the custom of the realm of England, and has no authority beyond her own territory, and the colonies, which she has planted in various parts of the world. It is no small

proof of its excellence, however, that where it has once taken root, it has never been superseded; and that its direct progress, or silent sway, has never failed to obliterate the attachment to other codes, whenever the accidents of conquest or cession have brought it within the reach of popular opinion. But there is another sense (which is the most usual sense), in which it is called the *common* law, to distinguish it from the *statute* law, or the positive enactments of the legislature. In this sense the common law is the *lex non scripta*, that is, the unwritten law, which cannot now be traced back to any positive text, but is composed of customs, and usages, and maxims, deriving their authority from immemorial practice, and the recognitions of courts of justice. Thus, the right of primogeniture, which is a fundamental rule of inheritances in England, does not depend upon any known statute, but upon the simple custom of the realm, of such high antiquity, that history does not reach its exact origin. Much, indeed, of this unwritten law may now be found in books, in elementary treatises, and in judicial decisions. But it does not derive its force from these circumstances. On the contrary, even judicial decisions are deemed but the formal promulgation of rules antecedently existing, and obtain all their value from their supposed conformity to those rules.

When our ancestors emigrated to America, they brought this common law with them, as their birth-right and inheritance; and they put into operation so much of it as was applicable to their situation. It became the basis of the jurisprudence of all the

English colonies ; and, except so far as it has been abrogated or modified by our local legislation, it remains to this very hour the guide, the instructor, the protector, and the ornament of every state within this republic, whose territory lies within our boundaries by the treaty of peace of 1783. May it ever continue to flourish here ; for it is the law of liberty, and the watchful and inflexible guardian of private property and public rights.

It is of this common law, in its largest extent, that the Law Institution in this university proposes to expound the doctrines and diversities ; and thus to furnish the means of a better juridical education to those, who are destined for the profession, as well as to those, who, as scholars and gentlemen, desire to learn its general principles.

Nor let any scholar or gentleman imagine, that the study is little worthy his attention, unless he is to engage in it for professional objects. I do not exaggerate its value, when I express the deliberate opinion, that there is not, within the compass of human attainment, any science, which has so direct a tendency as this, to strengthen the understanding, to enlarge its powers, to sharpen its sagacity, and to form habits of nice and accurate discrimination. Sir James Mackintosh, an elegant scholar, as well as a very competent judge, has said,* “ that more understanding has perhaps been in this manner exerted to fix the rules of life, than in any other science ; and it is certainly the most honorable occupation of the

* Introductory Discourse on the Study of the Law of Nature and Nations. p. 62, (3d edition.)

understanding, because it is the most immediately subservient to general safety and comfort." If this were a question dependent upon mere authority, perhaps testimony more unexceptionable to the general scholar might be drawn from other sources. Dr. Johnson, with his accustomed vigor of expression has stated, that "law is the science, in which the greatest powers of the understanding are applied to the greatest number of facts." And Mr. Burke, himself an orator and statesman of the most enlarged research, has not hesitated to declare, that it is "one of the first and noblest of human sciences ; a science, which does more to quicken and invigorate the understanding, than all other kinds of learning put together."*

But there is little need to appeal to the testimonies of the living or the dead upon such a topic. Whoever will take the trouble to reflect upon the vast variety of subjects, with which it is conversant, and the almost infinite diversity of human transactions, to which it applies ; whoever will consider, how much astuteness and ingenuity are required to unravel or guard against the contrivances of fraud, and the indiscretions of folly, the caprices of the wise and the errors of the rash, the mistakes of pride, the confidence of ignorance, and the sallies of enterprise, will be at no loss to understand, that there will be ample employment for the highest faculties. If he will but add to the account, that law is a science, which must be gradually formed by the successive efforts of many minds in many ages ; that its rudiments sink deep

* Speech on American Taxation, 1774.

into remote antiquity, and branch wider and wider with every new generation; that it seeks to measure the future by approximations to certainty derived solely from the experience of the past; that it must for ever be in a state of progress, or change, to adapt itself to the exigencies and changes of society; that even when the old foundations remain firm, the shifting channels of business must often leave their wonted beds deserted, and require new and broader substructions to accommodate and support new interests.* If, I say, he will but add these things to the account, it will soon become matter of surprise, that even the mightiest efforts of genius can keep pace with such incessant demands; and that the powers of reasoning, tasked and subtilized, as they must be, to an immeasurable extent, should not be absolutely overwhelmed in the attempt to administer justice.

From its nature and objects the common law, above all others, employs a most severe and scrutinizing logic. In some of its branches it is compelled to deal with metaphysical subtilties and abstractions, belonging to the depths of intellectual philosophy. From this cause it has sometimes been in danger of being enslaved by scholastic refinements, by the jargon of the old dialectics, and the sophisms of overcurious minds. It narrowly escaped shipwreck in the hands of the schoolmen of the middle ages; and for a while was almost swallowed up in the quick-

* See Lord Hale's noble Discourse on the Amendment of the Law, ch. 3.

sands of the feudal system. If it had not been, that it necessarily dealt with substances instead of shadows, with men's business, and rights, and inheritances, and not with entities and notions, it would have shared the fate, or justified the satire, upon metaphysical inquiries, that those, who attempted to sound its depths,

“In that unfathomable gulph were drown'd.”

But common sense has at all times powerfully counteracted the tendency to undue speculation in the common law, and silently brought back its votaries to that, which is the end of all true logic, the just application of principles to the actual concerns of human life. One cannot but smile in the present times at some of the reasoning and some of the fictions, which spread themselves, here and there, in small veins in the system. We are gravely told, for instance, by Bracton, in which he is followed by Lord Coke, that the true reason why by the common law a father cannot inherit real estate by descent from his son, is, that inheritances are heavy, and descend, as it were, by the laws of gravitation, and cannot reascend.* We are again told, that, when the title to an estate is suspended upon future contingencies, in the mean time the inheritance is in abeyance, that is, (as we are taught by the accompanying explanations,) the inheritance is *in gremio legis*, or *in nubibus*, in the bosom of the law, or in

* “Descendit itaque jus, quasi ponderosum quid cadens deorsum rectâ lineâ, vel transversali, et nunquam reascendit eâ viâ quâ descendit.” Bracton, lib. 2. ch. 29; Co. Litt. 11; 2 Bl. Com. 212.

the clouds, which seems to mend the matter exceedingly in point of plainness. And, again, when an estate is conveyed to trustees to serve existing uses, and future contingent uses also, we are told, that though a seisin is necessary to feed them, and it be now exhausted, yet happily for us, there remains a possibility of seisin, a *scintilla juris*, which kindles at the very moment the new uses spring into being, and by its vital power executes at once the possession of the estate to those uses, by some sort of legal legerdemain.* Shakspeare has immortalized by his genius the report of a case in that book of painful learning, Plowden's Commentaries, † in which Lady Margaret Hales, by the suicide of her husband, lost an estate by forfeiture to the crown, which she held jointly with him. One of the learned judges upon that occasion, in order to establish the legal conclusion, that the party killed himself in his lifetime, reasoned in this manner: "The felony is attributed to the act, which act is always done by a living man, and in his lifetime; for Sir James Hales was dead, and how came he to his death? It may be answered, By drowning. And who drowned him? Sir James Hales. And when did he drown him? In his lifetime. So that Sir James Hales, being alive, caused Sir James Hales to die; and the act of the living man was the death of the dead man. And then for this offence it is reasonable to punish the living man, who committed the offence, and not the dead

* Chudleigh's case (1 Co. Rep. 120) contains some curious reasoning on this subject.

† Plowden's Com. 258, 262.

man. But how can he be said to be punished alive, when the punishment comes after his death?" &c. &c.

But apart from a few blemishes of this sort, which belong, indeed, rather to the studies of the age, than to the law, and are now so harmless, that they serve little more than to give point to some sarcasm upon the profession, it is certain, that the common law follows out its principles with a closeness and simplicity of reasoning, which approach, as near as any artificial or moral deductions can, to the rigour of demonstration.

How, indeed, can it be otherwise? It is not employed in closet speculations, in the silence of the monastery, or in the seclusion of private life. Every cause is heard in the presence of men, whom practice and study have made singularly acute and discriminating. The advocate is stimulated, not merely by the hope of reward, and devotion to his client, but by the love of fame, to exert all his talents in order to detect fallacies, and answer objections. He is not at liberty, from mere courtesy or kindness, from private respect, or popular feeling, to gloss over the mistakes, or conceal the blunders, or suppress the inconsistencies of the argument of his adversary. In such places and on such occasions the law expects every man to do his duty, and his whole duty. He must search the dark, explore the weak, clear the doubtful, or confirm the strong points of his cause, as its exigencies may require. In such contests victory is rarely to be won, victory, I had almost said, is never won, without an arduous struggle. Mere

fanciful analogies, and set phrases, and fine turns of expression, and plausible statements will not do. They are but shadows or mists, which hover over the pathways to truth, but do not impede them. They may blind the novice, or betray the ignorant; but they do not deceive the wary and experienced traveller. There must be a firmer and closer grapple with realities. The contest is fit for men of strong sinews, and deep thoughts; and such men in all ages have been found foremost in the ranks of the bar, and eager for its distinctions. To the inquisitive scholar and gentleman, therefore, the law will be found a study full of instruction, and admirably adapted to brace his mind to a wholesome discipline. He will thus avoid what Lord Bacon considers some of the greatest obstacles to knowledge. For, says he, “facility to believe, impatience to doubt, temerity to answer, glory to know, doubt to contradict, end to gain, sloth to search, seeking things in words, resting part in nature; these, and the like, have been the things, which have forbidden the happy match between the mind of man, and the nature of things.”*

I might commend the study of the law to American citizens generally upon considerations of a broader cast. From the structure of our institutions, there is much to provoke the vigilance, and invite the leisure of all, and especially of educated men. Our government is emphatically a government of the people in all its departments. It purports to be a government of laws, and not of men—and yet beyond all others it is subject to the control and influence of public

*Praise of Knowledge, 2 Bacon's Works, 125.

opinion. Its whole security and efficiency depend upon the intelligence, virtue, independence, and moderation of the people. It can be preserved no longer than a reverence for settled, uniform laws constitutes the habit, I had almost said the passion of the community. There can be no freedom, where there is no safety to property, or personal rights. Whenever legislation renders the possession or enjoyment of property precarious; whenever it cuts down the obligation and security of contracts; whenever it breaks in upon personal liberty, or compels a surrender of personal privileges, upon any pretext, plausible or otherwise, it matters little, whether it be the act of the many, or the few, of the solitary despot, or the assembled multitude; it is still in its essence tyranny. It matters still less what are the causes of the change; whether urged on by a spirit of innovation, or popular delusion, or state necessity, (as it is falsely called,) it is still power, irresponsible power, against right; and the more to be dreaded, when it has the sanction of numbers, because it is then less capable of being resisted or evaded. Unfortunately, at such times the majority prevail by mere numbers, and not by force of judgment; *numerantur, non ponderantur*. I do not, therefore, overestimate its value, when I say, that a knowledge of the law and a devotion to its principles are vital to a republic, and lie at the very foundation of its strength.

An American citizen has many political duties to perform, and his activity is constantly demanded for the preservation of the public interests. He must

watch the exercise of power in every department of government, and ascertain, whether it is within the prescribed limits of the constitution. He is to study deeply and thoroughly the elements, which compose that constitution; elements, which were the slow results of genius, and patriotism, acting upon the largest views of human experience. The reasons, on which every part of this beautiful system is built (may it be as durable, as it is beautiful) are to be examined and weighed. Slight inconveniences are not to overturn them; slight objections are not to undermine them. Whatever is human is necessarily imperfect; whatever is practical necessarily deviates from theory; whatever works by human agency works with some inequality of movement and result. It is easier to point out defects, than to devise remedies; to touch blemishes, than to extract them; to demolish an edifice, than to erect a convenient substitute. We may not say of forms of government, that ‘that which is best administered is best.’ But we may say, that that, which generally works well, should rarely be hazarded upon the chances of a better. It has been observed by a profound statesman, that the abstract perfection of a government with reference to natural rights may be its practical defect. By having a right to do every thing, men may want every thing.* Great vigilance and great jealousy are therefore necessary

* Burke on the French Revolution. The whole passage is worthy of commendation. It begins thus: “Government is not made in virtue of natural rights, which may and do exist in total independence of it, and exist in much greater clearness and in a much greater degree of abstract perfection. But their abstract perfection is their practical defect.”

in republics to guard against the captivations of theory, as well as the approaches of less insidious foes. Governments are not always overthrown by direct and open assaults. They are not always battered down by the arms of conquerors, or the successful daring of usurpers. There is often concealed the dry rot, which eats into the vitals, when all is fair and stately on the outside. And to republics this has been the more common and fatal disease. The continual drippings of corruption may wear away the solid rock, when the tempest has failed to overturn it. In a monarchy, the subjects may be content to trust to the hereditary sovereign and the hereditary nobility the general superintendence of legislation and property. But in a republic, every citizen is himself in some measure entrusted with the public safety, and acts an important part for its weal or woe.

Our government also opens the widest field for talents and exertion to every rank of life. Few men, comparatively speaking, may not indulge the hope, if they covet the distinction, at some time to have a seat in the public councils, and assist in the public legislation. What can be more important or useful in such a station, than a knowledge of those laws, which the legislator is called upon to modify, amend, or repeal? How much doubt may a single injudicious amendment introduce. One would hardly trust to an unskilful artisan the repairs of any delicate machine. There would be an universal exclamation against the indiscretion of such an attempt. But yet it would seem, that we are apt to think that men are born legislators; that no qualifications beyond plain

sense and common honesty, are necessary for the management of the intricate machine of government ; and above all of that most delicate and interesting of all machines, a republican government. To adjust its various parts requires the skill of the wisest, and often baffles the judgment of the best. The least perturbation at the centre may transmit itself through every line of its movements ; as the dip of a pebble on the calm surface of a lake sends its circling vibrations to the distant shore.

It is a fact well known to professional gentlemen, that more doubts arise in the administration of justice from the imperfections of positive legislation, than from any other source. The mistakes in the language of a deed, or a will, rarely extend far beyond the immediate parties to the contract or bounty. And yet innumerable questions of interpretation have arisen from these comparatively private sources of litigation, to perplex the minds, and exhaust the diligence of the ablest judges. But what is this to the sweeping result of an act of the legislature, which declares a new rule for a whole State, which may vary the rights, or touch the interests, or control the operations of thousands of its citizens ? If the legislation is designedly universal in its terms, infinite caution is necessary to prevent its working greater mischiefs than it purports to cure. If, on the other hand, it aims only at a single class of mischiefs, to amend an existing defect, or provide for a new interest, there is still great danger, that its provisions may reach beyond the intent, and embrace what would have been most sedulously excluded, if it had

been foreseen or suspected. An anecdote told of Lord Coke may serve as an appropriate illustration. A statesman told him, that he meant to consult him on a point of law. "If it be common law," said Lord Coke, "I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed, if I answered you immediately."* What an admonition is this! And how forcibly does it teach us the utility of a knowledge of the general principles of law to persons, who are called upon to perform the functions of legislation.

But to gentlemen, who contemplate public life with higher objects, who indulge the ambition of being, not silent voters, but leaders in debate, and framers of laws, and guides in the public councils, every consideration already urged applies with ten-fold force. I will not speak of the disgrace and defeat, which must in such stations follow upon the exposure of ignorance; nor of the easy victory achieved by those, who bring to the controversy a ready knowledge, over those, who grope in the dark, and rely on their own rashness for success; nor of the intrinsic difficulty, in times like the present, of commanding public confidence without bringing solid wisdom in aid of popular declamation. But I would speak to the consciences of honorable men, and ask, how they can venture, without any knowledge of existing laws, to recommend changes, which may cut deep into the quick of remedial justice, or bring into peril all that is valuable in jurisprudence by its certainty, its policy, or its antiquity. Surely they need not be told,

* Teignmouth's Life of Sir W. Jones, 268.

how slowly every good system of laws must be in consolidating; and how easily the rashness of an hour may destroy, what ages have scarcely cemented in a solid form. The oak, which requires centuries to rear its trunk, and stretch its branches, and strengthen its fibres, and fix its roots, may yet be levelled in an hour. It may breast the tempest of a hundred years, and survive the scathing of the lightning. It may even acquire vigour from its struggles with the elements, and strike its roots deeper and wider, as it rises in its majesty; and yet a child, in the very wantonness of folly, may in an instant destroy it by removing a girdle of its bark.

It has been said, that a spirit of innovation is generally the result of a selfish temper and confined views.* Perhaps this is pressing the reasoning too far. It is more often the result of a strong imagination and ardent temperament, working upon the materials of the closet. But it is well in all cases to remember the wise recommendation of Lord Bacon, “that men in their innovations would follow the example of time itself, which, indeed, innovateth greatly, but quietly, and by degrees scarce to be perceived.” † And nothing can introduce more sobriety of judgment than the experience derived from the history of jurisprudence, and thus check what has been so happily termed too great a fluidness, lubricity, and unsteadiness in the laws. ‡

* Burke on the French Revolution.

† Bacon. *Essays*, 2 vol. Essay 24, p. 311.

‡ Lord Hale in *Harg. Tracts*, 255.

It is not, therefore, from mere professional pride or enthusiasm, that I would urgently recommend to gentlemen, ambitious of public life, some devotion to the study of the law, or suggest to scholars, that their education still wants perfection and polish, unless they have mastered its elements, In doing so, I do little more than adopt the precept of Mr. Locke, who says it is so requisite, that he knows of no place, from a justice of the peace to a minister of state, that can be well filled without it.* And in the days of Fortescue it was esteemed almost a necessary accomplishment for a gentleman of rank.†

But my principal object in this discourse is, to address myself to those, who intend to make the law a profession for life. To them it seems almost unnecessary to recommend the study, or press the ancient precept,

“Versate diu, quid ferre recusent,
Quid valeant humeri.”

To them the law is not a mere pursuit of pleasure or curiosity, but of transcendent dignity, as it opens the brightest rewards of human ambition, opulence, fame, public influence, and political honours. I may add, too, that if the student of the law entertains but a just reverence for its precepts, it will teach him to build his reputation upon the soundest morals, the deepest principles, and the most exalted purity of life and character. One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law, from which it seeks the

* Locke on Education, p. 84.

† Fortescue De Legg. ch. 49.

sanction of its rights, and by which it endeavours to regulate its doctrines. And, notwithstanding the specious objection of one of our distinguished statesmen, the boast is as true as it is beautiful. There never has been a period, in which the common law did not recognise Christianity as lying at its foundations.* For many ages it was almost exclusively administered by those, who held its ecclesiastical dignities. It now repudiates every act done in violation of its duties of perfect obligation. It pronounces illegal every contract offensive to its morals. It recognises with profound humility its holidays and festivals, and obeys them, as *dies non juridici*. It still attaches to persons believing in its divine authority the highest degree of competency as witnesses; and until a comparatively recent period, infidels and pagans were banished from the halls of justice, as unworthy of credit. The error of the common law was, in reality, of a very different character. It tolerated nothing but Christianity, as taught by its own established church, either Protestant or Catholic; and with unrelenting severity consigned the conscientious heretic to the stake, regarding his very scruples as proofs of incorrigible wickedness. Thus, justice was debased, and religion itself made the minister of crimes by calling in the aid of the secular power to enforce that conformity of belief, whose rewards and punishments belong exclusively to God.

But apart from this defect, the morals of the law are of the purest and most irreproachable character.

* See the remarks of Mr. Justice Park, in *Smith v. Sparrow*, 4 Bing. R. 84, 88.

And notwithstanding the sneers of ignorance, and the gibes of wit, no men are so constantly called upon in their practice to exemplify the duties of good faith, incorruptible virtue, and chivalric honour, as lawyers. To them is often entrusted the peace and repose, as well as the property, of whole families ; and the slightest departure from professional secrecy, or professional integrity, might involve their clients in ruin. The law itself imposes upon them the severest injunctions never to do injustice, and never to violate confidence. It not only protects them from disclosing the secrets of their clients, but it punishes the offenders, by disqualifying them from practice. The rebuke of public opinion, also, follows close upon every offence ; and the frown of the profession consigns to infamy the traitor, and his moral treason. Memorable instances of this sort have occurred in other ages, as well as in our own. Even the lips of eloquence breathe nothing but an empty voice in the halls of justice, if the ear listens with distrust or suspicion. The very hypocrite is there compelled to wear the livery of virtue, and pay her homage. If he secretly cherishes a groveling vice, he must there speak the language, and assume the port of innocence. He must feign, if he does not feel, the spirit and inspiration of the place.

I would exhort the student, therefore, at the very outset of his career, to acquire a just conception of the dignity and importance of his vocation. Let him not debase it by a low and narrow estimate of its requisites or its duties. Let him consider it, not as a mere means of subsistence, an affair of petty traffic and

barter, a little round of manœuvres and contrivances to arrest some runaway contract, to disinter some buried relic of title, or to let loose some imprisoned wrong from the vengeance of the law. Let him not dream that all is well, if he can weave an intricate net of special pleadings, to catch the unwary in its meshes; or hang a doubt upon a subtile distinction; or quibble through the whole alphabet of sophisms. Let him not imagine, that it is sufficient, if he be the thing described by Cicero in his scorn;—“*jurisconsultus ipse per se nihil, nisi leguleius quidem, cautus et acutus, præco actionum, cantor formularum, auceps syllabarum;*” * “a sharp and cunning pettifogger; a retailer of lawsuits; a canter about forms, and a caviller upon words;”—or one of the tribe, defined by a master spirit of the last age, as the ministers of municipal litigation, and the fomenters of the war of village vexation. † God forbid, that any man, standing in the temple, and in the presence of the law, should imagine that her ministers were called to such unworthy offices. No. The profession has far higher aims and nobler purposes. ‡ In the ordinary course of business, it is true, that sound learning, industry, and fidelity are the principal requisites, and may reap a fair reward, as they may in any other employment of life. But there are some, and in the lives of most lawyers, many occasions, which demand qualities of

* Cicero, *De Orat.* Lib. i. § 55. p. 87.

† Burke's *Reflections on the French Revolution.*

‡ I would commend to students the perusal of Mr. [now Judge] Hopkinson's Address before the Law Academy of Philadelphia, in 1826. It abounds with just remarks, chaste diction, and unpretending eloquence. Its matter and its style are excellent.

a higher, nay of the highest order. Upon the actual administration of justice in all governments, and especially in free governments, must depend the welfare of the whole community. The sacred rights of property are to be guarded at every point. I call them sacred, because, if they are unprotected, all other rights become worthless or visionary. What is personal liberty, if it does not draw after it the right to enjoy the fruits of our own industry? What is political liberty, if it imparts only perpetual poverty to us, and all our posterity? What is the privilege of a vote, if the majority of the hour may sweep away the earnings of our whole lives, to gratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of a temporary popularity? What remains to nourish a spirit of independence, or a love of country, if the very soil, on which we tread, is ours only at the beck of the village tyrant? If the home of our parents, which nursed our infancy and protected our manhood, may be torn from us without recompense or remorse? If the very graveyards, which contain the memorials of our love and our sorrow, are not secure against the hands of violence? If the church of yesterday may be the barrack of to-day, and become the gaol of to-morrow? If the practical text of civil procedure contains no better gloss than the Border maxim, that the right to plunder is only bounded by the power?

One of the glorious, and not unfrequently perilous duties of the bar is the protection of property, and not of property only, but of personal rights, and personal character; of domestic peace, and parental

authority. The lawyer is placed, as it were, upon the outpost of defence, as a public sentinel, to watch the approach of danger, and to sound the alarm, when oppression is at hand. It is a post, not only full of observation, but of difficulty. It is his duty to resist wrong, let it come in whatever form it may. The attack is rarely commenced in open daylight; but it makes its approaches by dark and insidious degrees. Some captivating delusion, some crafty pretext, some popular scheme, generally masks the real design. Public opinion has been already won in its favor, or drugged into a stupid indifference to its results, by the arts of intrigue. Nothing, perhaps, remains between the enterprise and victory, but the solitary citadel of public justice. It is then, the time for the highest efforts of the genius, and learning, and eloquence, and moral courage of the bar. The advocate not unfrequently finds himself, at such a moment, putting at hazard the popularity of a life devoted to the public service. It is then that the denunciations of the press may be employed to overawe or intimidate him. It is then, that the shouts of the multitude drown the still, small voice of the unsheltered sufferer. It is then, that the victim is already bound for immolation; and the advocate stands alone to maintain the supremacy of the law against power, and numbers, and public applause, and private wealth. If he shrinks from his duty, he is branded as the betrayer of his trust. If he fails in his labour, he may be cut down by the same blow, which levels his client. If he succeeds, he may, indeed, achieve a glorious triumph for truth and

justice, and the law. But that very triumph may be fatal to his future hopes, and bar up for ever the road to political honours. Yet what can be more interesting, than ambition thus nobly directed? that sinks itself, but saves the State? What sacrifice more pure, than in such a cause? What martyrdom more worthy to be canonized in our hearts?

It may be that his profession calls him to different duties. He may be required to defend against the arm of the government a party standing charged with some odious crime, real or imaginary. He is not at liberty to desert even the guilty wretch in his lowest estate; but he is bound to take care, that even here the law shall not be bent or broken to bring him to punishment. He will at such times, from love of the law, as well as from compassion, freely give his talents to the cause, and never surrender the victim, until the judgment of his peers has convicted him upon legal evidence. A duty, not less common, or less interesting, is the vindication of innocence against private injustice. Rank, and wealth, and patronage may be on one side; and poverty and distress on the other. The oppressor may belong to the very circle of society, in which we love to move, and where many seductive influences may be employed to win our silence. The advocate may be called upon to require damages from the seducer for his violation of domestic peace; or to expose to public scorn the subtle contrivances of fraud. The ardour of youth may have been ensnared by cunningly devised counsels to the ruin of his estate. The drivelling of age may have been imposed on to pro-

cure a grant or a will, by which nature is outraged, and villany rewarded. Religion itself may have been treacherously employed at the side of the death-bed to devour the widow's portion, or plunder the orphan. In these, and many other like cases, the attempt to unravel the fraud, and expose the injury, is full of delicacy, and may incur severe displeasure among friends, and yield a triumph to enemies. But it is on such occasions, that the advocate rises to a full sense of the dignity of his profession, and feels the power and the responsibility of its duties. He must then lift himself to thoughts of other days, and other times; to the great moral obligations of his profession; to the eternal precepts of religion; to the dictates of that voice, which speaks within him from beyond the grave, and demands, that the mind given by God shall be devoted to his service, without the fear, and without the frailty of man.

But whatever may be the dignity and the brilliancy either of fame or fortune, which the profession holds out to those, who strive for eminence in the law, the student should never imagine that the ascent is easy, or the labour light. There cannot be any delusion cherished more fatal to his ultimate success than this. Young men of gay and ardent temperaments are apt to imagine, that little more is necessary than to read a few elementary books with reasonable diligence, and the rewards are already within their grasp. They fondly indulge the belief, that fluency of speech, a kindling imagination, ready wit, graceful action, and steady self-confidence will carry them through every struggle. If they can but address a

court or jury without perturbation, and state their points with clearness and order, the rest may fairly be left to the workings of their own minds upon the excitements of the occasion. That because the hour is come and the trial is come, the inspiration for the cause will come also.

Whoever shall indulge in such visionary views, will find his career end in grievous disappointment, if not in disgrace. I know not, if among human sciences there is any one, which requires such various qualifications and extensive attainments, as the law. While it demands the first order of talents, genius alone never did, and never can, win its highest elevations. There is not only no royal road to smooth the way to the summit; but the passes, like those of Alpine regions, are sometimes dark and narrow; sometimes bold and precipitous; sometimes dazzling from the reflected light of their naked fronts; and sometimes bewildering from the shadows projecting from their dizzy heights. Whoever advances for safety must advance slowly. He must cautiously follow the old guides, and toil on with steady footsteps; for the old paths, though well beaten, are rugged; and the new paths, though broad, are still perplexed.

To drop all metaphor, the law is a science, in which there is no substitute for diligence and labour. It is a fine remark of one, who is a brilliant example of all he teaches, that "it appears to be the general order of providence, manifested in the constitution of our nature, that every thing valuable in human acquisition should be the result of toil and la-

bour.”* But this truth is nowhere more forcibly manifested than in the law. Here, moderate talents with unbroken industry have often attained a victory over superior genius, and cast into shade the brightest natural parts.

The student, therefore, should, upon his first entrance upon the study, weigh well the difficulties of his task, not merely to guard himself against dependency on account of expectations too sanguinely indulged; but also to stimulate his zeal, by a proper estimate of the value of perseverance. He, who has learned to survey the labour without dismay, has achieved half the victory. I will not say with Lord Hale, that “the law will admit of no rival, and nothing to go even with it;” but I will say, that it is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favours, but by a lavish homage.

Many causes combine to make the study of the common law, in the present day, a laborious undertaking. In the first place, it necessarily embraces the reasoning and doctrines of very remote ages. It is, as has been elegantly said, “The gathered wisdom of a thousand years;” † or, in the language of one of the greatest of English judges, it is not “the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men.” ‡ It is a system having its

* Chancellor Kent's Introductory Discourse, p. 8. Why has this finished discourse been withdrawn from his Commentaries?

† Teignmouth's Life of Sir W. Jones, 100.

‡ Lord Hale in preface to Rolfe's Abridgment, 1 Coll. Jurid. 266.

foundations in natural reason ; but at the same time built up and perfected by artificial doctrines adapted and moulded to the artificial structure of society. The law, for instance, which governs the titles to real estate, is principally derived from the feudal polity and usages, and is in a great measure unintelligible without an intimate acquaintance with the peculiarities of that system. This knowledge is not, even now, in all cases easily attainable ; but must sometimes be searched out amidst the dusty ruins of antiquity, or traced back through black-lettered pages of a most forbidding aspect both in language and matter. The old law, too, is not only of an uncouth and uninviting appearance ; but it abounds with nice distinctions, and subtile refinements, which enter deeply into the modern structure of titles. No man, even in our day, can venture safely upon the exposition of an intricate devise, or the effect of a power of appointment, or of a deed to lead uses and trusts, who has not, in some good degree, mastered its learning. More than two centuries ago Sir Henry Spelman* depicted his own distress upon entering upon such studies, when at the very vestibule he was met with a foreign language, a barbarous dialect, an inelegant method, and a mass of learning, which could be borne only upon the shoulders of Atlas ; and frankly admitted, that his heart sunk within him at the prospect. The defects of a foreign tongue, and barbarous dialect, and inelegant order, have almost entirely disappeared, and no longer vex the

* Preface to his Glossary. The passage is partially quoted in 1 Blackstone's Com. 31, note.

student in his midnight vigils. But the materials for his labour have in other respects greatly accumulated in the intermediate period. He may, perchance, escape from the dry severity of the Year Books, and the painful digestion of the Abridgments of Statham, Fitzherbert, and Brooke. He may even venture to glide by the exhausting arguments of Plowden. But Lord Coke, with his ponderous Commentaries, will arrest his course; and faint and disheartened with the view, he must plunge into the labyrinths of contingent remainders, and executory devises, and springing uses, and deem himself fortunate, if after many years' devotion to Fearn, he may venture upon the interpretation of that darkest of all mysteries, a last will and testament. So true it is, that no man knows his own will so ill, as the testator; and that over-solicitude to be brief and simple, ends in being profoundly enigmatical. *Dum brevis esse laboro, obscurus fio.*

In the next place, as has been already hinted, every successive age brings its own additions to the general mass of antecedent principles. If something is gained by clearing out the old channels, much is added by new increments and deposits. If here and there a spring of litigation is dried up, many new ones break out in unsuspected places. In fact, there is scarcely a single branch of the law, which belonged to the age of Queen Elizabeth, which does not now come within the daily contemplation of a lawyer of extensive practice. And all these branches have been spreading to an incalculable extent since that period by the changes in society wrought by

commerce, agriculture, and manufactures, and other efforts of human ingenuity and enterprise.

We are, therefore, called upon at this moment to encounter, ay, and to master the juridical learning of the three last centuries, during which the talents of the bar, and the researches of the bench are embodied in solid and enduring volumes. Fortescue* has told us, that in his age the judges did not sit in Court but three hours in the day; and that when they had taken their refreshments, they spent the rest of the day in the study of the law, reading of the holy Scriptures, and other innocent amusements at their pleasure; so that it seemed rather a life of contemplation than of much action; and that their time was spent in this manner free from care and worldly avocations. The case was greatly changed in the succeeding century; and we need but examine the ample reports and commentaries of Lord Coke, to perceive what a prodigious influx of learning bore down the profession in his day. At the distance of another century Lord Hale was compelled to admit the heavy and almost overwhelming burthens of the law. And we in the nineteenth century may well look with some apprehension upon the accumulations of our own times. It is not an over-statement to declare, that the labours of the profession now are ten times as great, as they were in the days of Lord Coke; and that they have been quadrupled within the last century. The whole series of English Reports down to the Revolution of 1688, scarcely exceeds one hundred volumes; while those since that

* Fortescue, *De Laud. Legum Angliæ*, ch. 51.

period fall little short of three hundred. To this goodly mass America has added within the short space of twenty years more than two hundred volumes. If to these we add the excellent elementary treatises, which have filled our libraries during these latter periods, we shall find, that not merely the lucubrations of twenty years, but a long life will scarcely suffice to attain the requisite learning.

In truth, the common law, as a science, must be for ever in progress; and no limits can be assigned to its principles or improvements. In this respect it resembles the natural sciences, where new discoveries continually lead the way to new, and sometimes to astonishing results. To say, therefore, that the common law is never learned, is almost to utter a truism. It is no more than a declaration, that the human mind cannot compass all human transactions. It is its true glory, that it is flexible, and constantly expanding with the exigencies of society; that it daily presents new motives for new and loftier efforts; that it holds out for ever an unapproached degree of excellence; that it moves onward in the path towards perfection, but never arrives at the ultimate point.

But the student should not imagine, that enough is done, if he has so far mastered the general doctrines of the common law, that he may enter with some confidence into practice. There are other studies, which demand his attention. He should addict himself to the study of philosophy, of rhetoric, of history, and of human nature. It is from the want of this enlarged view of duty, that the profession has sometimes been reproached with a sordid narrowness,

with a low chicane, with a cunning avarice, and with a deficiency in liberal and enlightened policy. Mr. Burke has somewhat reluctantly admitted the fact, that the practice of the law is not apt, except in persons very happily born, to open and liberalize the mind exactly in the same proportion, as it invigorates the understanding; and that men too much conversant in office are rarely minds of remarkable enlargement.* And Lord Bacon complains, that lawyers have never written as statesmen.† The reproach is in some measure deserved. It is, however, far less true in our age, than in former times; and far less true in America, than in England. Many of our most illustrious statesmen have been lawyers; but they have been lawyers liberalized by philosophy, and a large intercourse with the wisdom of ancient and modern times. The perfect lawyer, like the perfect orator, must accomplish himself for his duties by familiarity with every study. It may be truly said, that to him nothing, that concerns human nature or human art, is indifferent or useless. He should search the human heart, and explore to their sources the passions, and appetites, and feelings of mankind. He should watch the emotions of the dark and malignant passions, as they silently approach the chambers of the soul in its first slumbers. He should catch the first warm rays of sympathy and benevolence, as they play round the character, and are

* See Burke's Reflections on the French Revolution, and Speech on American Taxation.

† Lord Bacon on the Advancement of Learning, 1 Bacon's Works, 218.

reflected back from its varying lines. He should learn to detect the cunning arts of the hypocrite, who pours into the credulous and unwary ear his leperous distilment. He should for this purpose make the master-spirits of all ages pay contribution to his labours. He should walk abroad through nature, and elevate his thoughts, and warm his virtues by a contemplation of her beauty, and magnificence, and harmony. He should examine well the precepts of religion, as the only solid basis of civil society, and gather from them not only his duty, but his hopes; not merely his consolations, but his discipline and his glory. He should unlock all the treasures of history for illustration, and instruction, and admonition. He will thus see man, as he has been, and thereby best know, what he is. He will thus be taught to distrust theory, and cling to practical good; to rely more upon experience, than reasoning; more upon institutions, than laws; more upon checks to vice, than upon motives to virtue. He will become more indulgent to human errors; more scrupulous in means, as well as in ends; more wise, more candid, more forgiving, more disinterested. If the melancholy infirmities of his race shall make him trust men less, he may yet learn to love man more.

Nor should he stop here. He must drink in the lessons and the spirit of philosophy. I do not mean that philosophy described by Milton, as

“ a perpetual feast of nectared sweets,
Where no crude surfeit reigns ;”

but that philosophy, which is conversant with men's business and interests, with the policy and the wel-

fare of nations ; that philosophy, which dwells not in vain imaginations, and Platonic dreams ; but which stoops to life, and enlarges the boundaries of human happiness ; that philosophy, which sits by us in the closet, cheers us by the fireside, walks with us in the fields and highways, kneels with us at the altars, and lights up the enduring flame of patriotism.

What has been already said, rather presupposes than insists upon the importance of a full possession of the general literature of ancient and modern times. It is this classical learning alone, which can impart a solid and lasting polish to the mind, and give to diction, that subtile elegance and grace, which colour the thoughts with almost transparent hues. It should be studied, not merely in its grave disquisitions, but in its glorious fictions, and in those graphical displays of the human heart, in the midst of which we wander as in the presence of familiar, but disembodied spirits.

It is by such studies, and such accomplishments, that the means are to be prepared for excellence in the highest order of the profession. The student, whose ambition has measured them, if he can but add to them the power of eloquence, (that gift, which owes so much to nature, and so much to art,) may indeed aspire to be a perfect lawyer. It cannot be denied, indeed, that there have been great lawyers, who were not orators ; as there have been great orators, who were not lawyers. But it must be admitted at the same time, that when both characters are united in the same person, human genius has approached as near perfection, as it may. They

are kindred arts, and flourish best in the neighbourhood of each other.*

The eloquence of the bar is far more various and difficult, than that which is required in the pulpit, in the legislative hall, or in popular assemblies. It occasionally embraces all that belongs to each of these places, and it has, besides, many varieties of its own. In its general character it may be said to be grave, deliberative, and earnest, allowing little indulgence to fancy, and less to rhetoric. But as it must necessarily change its tone according to its subject, and the tribunal, to which it is addressed, whether the court or the jury, there is ample scope for the exercise of every sort of talent, and sometimes even for dramatic effect. On some occasions it throws aside all the little plays of phrase, the vivid touches of the pencil, and the pomp and parade of diction. It is plain, direct, and authoritative. Its object is to convince the understanding, and captivate the judgment by the strength and breadth of its reasoning. Its power is in the thought, and not in the expression; in the vigour of the blow from the hand of a giant; in the weight of the argument, which crushes in its fall, what it has not levelled in its progress. At other times it is full of calm dignity and persuasiveness. It speaks with somewhat of the majesty of the law itself, in strains of deep, oracular import. It unfolds its results with an almost unconscious elegance, and its thoughts flash like the sparkles of the diamond. At other times it is earnest, impassioned,

* "Præclaras duas artes," says Cicero, "atque inter se pares, et ejusdem socias dignitatis." Cic. de Oratore, Lib. i. § 55.

and electrifying; awing by its bold appeals, or blinding by its fiery zeal. At other times it is searching, and acute, and rigorous; now brilliant in point, now gay in allusion, now winning in insinuation. At other times it addresses the very souls of men in the most touching and pathetic admonitions. It then mingles with the close logic of the law those bewitching graces, which soothe prejudice, disarm resentment, or fix attention. It utters language, as the occasion demands, which melts to pity, or fires with indignation, or exhorts to clemency.

But whatever may be the variety of effort demanded of forensic eloquence, whether to convince, or captivate, or persuade, or inflame, or melt;—still its main character must for ever be like the “grave rebuke,” so finely sketched by our great epic poet, “severe in youthful beauty,” that it may possess an “added grace invincible.”* It may not stoop to ribaldry, or vulgar jests, or sickly sentimentality, or puerile conceits. It forbids declamation, and efflorescence of style. There is no room for the loquacity of ignorance, or the insolence of pride. If wit be allowable, it must be chaste and polished. The topics discussed in courts of justice are too grave for merriment, and too important for trifling. When life, or character, or fortune hangs on the issue, they must be vindicated with dignity, as well as with force.

But I forbear. I seem, indeed, when the recollection of the wonders wrought by eloquence comes over my thoughts, to live again in scenes long since past. The dead seem again summoned to their

* Paradise Lost, Book iv. line 844.

places in the halls of justice, and to utter forth voices of an unearthly and celestial harmony. The shades of Ames, and Dexter, and Pinkney, and Emmett pass and repass, not hush as the foot of night, but in all the splendour of their fame, fresh with the flush of recent victory. I may not even allude to the living. Long, long may they enjoy the privilege of being nameless here, whose names are every where else upon the lips of praise.

Enough has been said, perhaps more than enough, to satisfy the aspirant after juridical honours, that the path is arduous, and requires the vigour of a long and active life. Let him not, however, look back in despondency upon a survey of the labour. The triumph, if achieved, is worth the sacrifice. If not achieved, still he will have risen by the attempt, and will sustain a nobler rank in the profession. If he may not rival the sagacity of Hardwicke, the rich and lucid learning of Mansfield, the marvellous judicial eloquence of Stowell, the close judgment of Parsons, the comprehensive reasoning of Marshall, and the choice attainments of Kent;—he will yet, by the contemplation and study of such models, exalt his own sense of the dignity of the profession, and invigorate his own intellectual powers. He will learn, that there is a generous rivalry at the bar; and that every one there has his proper station and fame assigned to him; and that, though one star differeth from another in glory, the light of each may yet be distinctly traced, as it moves on, until it is lost in that common distance, which buries all in a common darkness.

Having spoken thus much upon the dignity, the qualifications, and the duties of the profession, I trust it will not be supposed, that we have the rashness to indulge the belief, that the Law Institution here, under the guidance of its present Professors, can fill up the outline, which has thus been traced. My learned brother will, indeed, bring to the task of instruction, the ardour, the attainments, and the experience, which elsewhere have given him such an elevated reputation. Little, indeed, of what has been sketched out in this discourse, can be attained by any academical instruction during the usual period assigned for the preparatory studies for the bar. And of that little, we have not the presumption to believe, that our method or efforts can reach even our own wishes and opinions. What we propose is no more than plain, direct, familiar instruction ; something to assist the student in the first steps of his studies ; something to cheer him in his progress ; something to disencumber him of difficulties by the way-side ; and something to awaken a sincere ambition for professional excellence.

For myself, I am but too conscious, how little I can bring to the task, worthy of the occasion. The perpetual round of judicial duties, full of anxious thoughts, and anxious vigils, might, even at an earlier period of life, have repressed the elasticity of hope. But in entering upon new duties at the present time, I confess myself more fearful of failure, than ambitious of distinction. I may not say, with the enviable self-satisfaction of an eminent judge, now reposing in leisure sustained with dignity, that "long absence

from the bar, the consequent want of practice, age, the enjoyment of repose, and the indolence, which that repose often produces, have increased *my* unwillingness to undertake a work of labour.”* But I may say, in the language of a kindred mind to his, that “after a certain age and portion of experience, the sense of duty becomes a stronger principle of action, than the love of reputation.”† I shall be content, therefore, if, able to meet the duties of the office, I shall not wholly disappoint the expectations of the Founder, by whose kind solicitude I have been advanced to this chair. Indeed, I may say, that but from a desire to justify his early friendship (as welcome, as it was then unexpected), and to express my own sense of his liberal donation, I should have declined a post, which others might fill with more undivided attention, though not, perhaps, with more sincere zeal. Under such circumstances, I hope that I may be permitted to occupy a few moments more, in expounding the objects of this professorship, and thus demonstrate the wisdom and munificence of the Founder.

The duties assigned to the Dane Professorship are, in the first instance, to deliver lectures upon the Law of Nature, the Law of Nations, Maritime and Commercial Law, Equity Law, and, lastly, the Constitutional Law of the United States. No reflecting man can hesitate to admit the importance of these branches of jurisprudence, and their intimate connexion with the best interests of civilized society. To comment on either of them, fully and worthily, might well em-

* Lord Redesdale.

† Chancellor Kent.

ploy the diligence of a long life, without exhaustion or repetition. A course of lectures, therefore, which embraces them all, must necessarily treat them in a brief, summary, and imperfect manner. It must suggest matter for inquiry, rather than expound principles with copiousness. It must create, rather than satisfy curiosity. It must illustrate by examples, rather than exhaust by analysis. It must display the foundations, rather than the size or exact proportions of the edifice. It must, if I may venture upon such a metaphor, conduct the inquirer to the vestibule of the temple of jurisprudence ; and leave to his future curiosity the survey of its magnificent halls, its decorated columns, its splendid porticos, its harmonized orders, its massive walls, its varied crypts, its lofty domes, its “ever-during gates, on golden hinges moving.”

And first, the Law of Nature. This lies at the foundation of all other laws, and constitutes the first step in the science of jurisprudence. The law of nature is nothing more than those rules, which human reason deduces from the various relations of man ; to form his character, and regulate his conduct, and thereby ensure his permanent happiness. It embraces a survey of his duties to God, his duties to himself, and his duties to his fellow men ; deducing from those duties a corresponding obligation. It considers man, not merely in his private relations as a social being, but as a subject and magistrate, called upon to frame, administer, or obey laws, and owing allegiance to his country and government, and bound, from the protection he derives from the institutions of society, to uphold and protect them in return. It

is, therefore, in the largest sense, the philosophy of morals ; what Justinian has defined justice to be, “constans et perpetua voluntas jus suum cuique tribuendi ;” or what may be denominated national jurisprudence, as expounded in the same authority ; “divinarum atque humanarum rerum notitia, justi atque injusti scientia.” With us, indeed, who form a part of the Christian community of nations, the law of nature has a higher sanction, as it stands supported and illustrated by revelation. Christianity, while with many minds it acquires authority from its coincidences with the law of nature, as deduced from reason, has added strength and dignity to the latter by its positive declarations. It goes farther. It unfolds our duties with far more clearness and perfection than had been known before its promulgation ; and has given a commanding force to those of imperfect obligation. It relieves the mind from many harassing doubts and disquietudes, and imparts a blessed influence to the peaceful and benevolent virtues, to mercy, charity, humility, and gratitude. It seems to concentrate all morality in the simple precept of love to God and love to man. It points out the original equality of all mankind in the eyes of the Supreme Being, and brings down the monarch to the level of his subjects. It thus endeavours to check the arrogance of power, and the oppression of prerogative ; and becomes the teacher, as well as the advocate of rational liberty. Above all, by unfolding in a more authoritative manner the doctrine of the immortality of the soul, it connects all the motives and actions of man in his present state with his future

interminable destiny. It thus exhorts him to the practice of virtue, by all, that can awaken hope, or secure happiness. It deters him from crimes by all, that can operate upon his fears, his sensibility, or his conscience. It teaches him, that the present life is but the dawn of being; and that in the endless progress of things the slightest movement here may communicate an impulse, which may be felt through eternity. Thus Christianity becomes, not merely an auxiliary, but a guide to the law of nature, establishing its conclusions, removing its doubts, and elevating its precepts.

In this manner it is, that the law of nature involves a consideration of the nature, faculties, and responsibilities of man. From his intellectual powers, and the freedom of his will, it deduces his moral perceptions and accountability. From his love of happiness, as the end and aim of his being, it deduces the duty of preserving that happiness. From his dependence upon the Supreme Being, whose will has indissolubly connected virtue with happiness, it deduces the primary duty of obedience to that will. From these simple elements it proceeds to consider him in the various relations of life, in which he may be placed, and ascertains in each his obligations and duties. It considers him as a solitary being, as a member of a family, as a parent, and lastly as a member of the commonwealth.

The consideration of this last relation introduces us at once to the most interesting and important topics; the nature, objects, and end of government; the institution of marriage; the origin of the rights

of property ; the nature and limits of social liberty ; the structure of civil and political rights ; the authority and policy of laws ; and indeed all those institutions, which form the defence and the ornament of civilized society.*

Upon many of these topics, of which a very imperfect sketch can here be given, I shall speak with much brevity and reserve, for two reasons. In the first place, in the course of the academical instruction in this University already provided for, the subjects of ethics, natural law, and theology, are assigned to other professors. In the next place, in the elementary education, every where passed through, before entering upon juridical studies, they are usually taught with sufficient fulness and accuracy.

In the next place, the Law of Nations. By this we are to understand not merely that portion of public law, which is generally recognised among nations, as seems to have been the prevailing sense of the phrase in the Roman code ; but that portion of public law, which regulates the intercourse, adjusts the rights, and forms the basis of the commercial and political relations of states with each other. Perhaps the most appropriate name would be, International Law, *jus inter gentes*. It has in this view been very correctly subdivided into three sorts ; first, the natural or necessary law of nations, in which the principles of natural justice are applied to the inter-

* Mr. Hoffman's Legal Outlines, of which the first volume only is yet published, contains some very interesting and valuable disquisitions upon several of the topics belonging to this branch of law. I trust the learned author will soon favour the public with the residue of his work.

course between states ; secondly, the customary law of nations, which embodies those usages, which the continued habit of nations has sanctioned for their mutual interest and convenience ; and, thirdly, the conventional or diplomatic law of nations, which embraces positive compacts by treaties and conventions between nations, and derives its sole obligation from the same sources as other contracts. Under this last head many regulations will now be found, which at first resulted from custom, or a general sense of justice, and are now made of positive obligation for the purpose of preventing national disputes and collisions.

Upon the general theory of the law of nations much has been written by authors of great ability and celebrity. At the head of the list stands that most extraordinary man, Grotius, whose treatise *de Jure Belli et Pacis* was the first great effort in modern times to reduce into any order the principles belonging to this branch of jurisprudence, by deducing them from the history and practice of nations, and the incidental opinions of philosophers, orators, and poets. His eulogy has been already pronounced in terms of high commendation, but so just and so true, that it were vain to follow, or add to his praise.* Puffendorf in a dry, didactic manner, has drawn out, in the language of the times, much to strengthen the conclusions of his master upon natural law ; and the sagacity of Barbeyrac, in his luminous Commentaries, has cleared away many obscurities, and vindicated

* Sir James Mackintosh, in his Introductory Discourse.

many positions. Wolfius, who is better known among us in his elegant abridger, Vattel, has more elaborately discussed the theory, with the improved lights of modern days. And Ward, in his unpretending, but exact Inquiry into the Foundation and History of the Law of Nations in Europe from the time of the Greeks and Romans to the age of Grotius, has afforded ample materials for illustration and profound reflection. Bynkershoek is a writer of a very different cast; and in a clear, bold, and uncompromising manner, lays down his principles, as practical results, with a brevity and vigour, which give them almost the authority of a text-book. He is not, however, a mere apologist, or collector of usages; but he insists with an animated vehemence, that reason is the very soul of the law of nations. “Ratio ipsa (inquam) ratio juris gentium est anima.”*

But I know not, if there be in existence any treatise on this subject, which in point of fulness and accuracy of principles, or copiousness of detail, is adapted to the exigencies of modern society, or is calculated in any moderate degree to satisfy the expectations of a scholar or a publicist. There is yet living a man,† whose character as a philosophical moralist, enlightened statesman, and liberal jurist, commands universal respect, who taught us in his

* Bynker. Quest. Pub. Jur. ch. 2. Mr. Du Ponceau's Translation of this work is a most valuable present to the profession. Indeed, when one considers the liberal and acute spirit, which pervades all the juridical publications of Mr. Du Ponceau, it is matter of universal regret, that he has not exclusively devoted his life to the exposition of law, and particularly of the civil law.

† Sir James Mackintosh.

early performances, that to his genius we might thereafter owe such an invaluable donation. But the lapse of thirty years, and the seductive influence of other studies lead us now to fear, that our hopes will end in disappointment. Such a treatise should embrace, among other things, a general view of the sovereignty, equality, and independence of nations ; the rights of public domain, and territorial jurisdiction in rivers, bays, lakes, and streams, and the ocean ; the intercourse of nations in times of peace, in respect to commerce and navigation ; the immunities, and liabilities, and privileges of foreigners ; the rights and duties of ambassadors and other ministers ; the grounds of just war ; the rights and duties of belligerents and neutrals, and the limits of just hostilities ; the rights of conquest ; the nature of piracy ; the nature and effect of alliances, armistices, passports, and safe-conducts ; and the negotiation, interpretation, and obligation of treaties of peace and other treaties. My object will be, in the discussion of these topics, to expound the general theory with as much conciseness, as the nature of the case will admit ; and to devote my principal labour to the developement of those practical results, which are of perpetual application in the common business of life, and regulate the daily concerns of individuals and nations in peace and in war. For this purpose, I shall adventure far more, than has been usual with publicists, into an examination of those general principles of jurisprudence, which affect the contracts, govern the titles, and limit the remedies of the subjects of independent powers, who acquire rights, or

contract obligations, or succeed to property, or are in any measure subjected to the municipal law in a foreign country. This will include a variety of delicate and interesting topics belonging to the operation of foreign jurisprudence, or, as it is sometimes called, the *lex fori et lex loci*. Among these are the law of foreign domicil and expatriation; of foreign marriages, divorces, and crimes; of foreign testaments and successions *ab intestato*; of foreign grants and agreements; of foreign prescriptions, limitations, presumptions, discharges, and judgments; of foreign asylum to deserters and fugitives; and as incidental, the nature and extent of the jurisdiction exercised by courts of law in enforcing rights between foreigners, or giving effect to the municipal prohibitions of foreign countries. I shall also adventure upon an ample discussion of the law of prize, including therein the law of captures, and recaptures, and reprisal, the law of postliminy, and the law of contraband, and blockade, and illegal trade. And as a fit conclusion of such a discussion, I shall give a summary view of the practice and jurisprudence of those tribunals, emphatically called courts of the law of nations, which in every country are ordained to administer this important branch of public law. In England and America, this jurisdiction is vested in the courts of Admiralty. In this part of my labours I shall freely use the materials, which have been furnished by those distinguished civilians, who have from time to time adorned the English and American courts of Admiralty. And, above all, I shall endeavour to avail myself of those masterly judgments, full of wisdom, and learning, and captivating eloquence, which have

been pronounced within the last thirty years by a man,* to whom, in my deliberate opinion, the world is more indebted for a practical exposition of the law of nations, upon the eternal principles of justice and reason, than to all the jurists of all former ages.

In the next place, Equity Jurisprudence. This is a very comprehensive head of our municipal law, and in its actual administration, probably embraces as great a variety and extent of learning, as the aggregate of all those, which now fall within the jurisdiction of the courts of common law, in the strict sense the terms. The jurisdiction in equity is sometimes concurrent with courts of common law, as in matters of account, partition, and dower; and sometimes it is exclusive and paramount. Its exclusive jurisdiction covers an immense mass of doctrines, relative to truths, frauds, mistakes, and accidents, and other cases, which the remedial justice of the common law courts cannot reach. It is a common, but groundless notion, that equity consists in the administration of a sort of discretionary justice; and is not, like the common law, built upon exact principles and settled rules; that it is a transcendental power, acting above the law, and superseding and annulling its operations, and resting in an undefined and arbitrary judgment, at best the *arbitrium boni viri*, rather than *boni jurisconsulti*. There is, therefore, among those, who have not cultivated it, as a science, a spectral dread of it, as if some unquiet spirit walked abroad to disturb the repose of titles, and revive forgotten and dormant claims. It is strange, that such a delusion should find countenance, even within the pale of the profes-

* Lord Stowell (late Sir William Scott).

sion itself. There is not, at the present moment, a single department of the law, which is more completely fenced in by principle, or that is better limited by considerations of public convenience, both in doctrine and discipline, than equity. It is an intricate, but an exquisitely finished system, wrought up with infinite care, and almost uniformly rational and just in its conclusions. Indeed, that portion of the common law, which is now most admired for its sound policy, derives its principal attraction from its being founded in a large and liberal equity, and therefore is assumed as a rule equally at Paris and at London, at Rome and at Washington. If it would not occupy too much space in an introductory discourse, I might vindicate these assertions against every objection. But this is not the time, or the occasion.

In the next place, Commercial and Maritime Law. By commercial law, we are accustomed to understand those branches of jurisprudence, which regulate the operations of trade at home and abroad ; and by maritime law, those, which concern navigation, shipments, commerce, and other transactions on the sea. In truth they are perpetually running into each other, as the streams of many rivers flow into the ocean, and form a part of its mass of waters, and are almost incapable of an absolute separation. There can be little need to descant upon the value and importance of this part of our jurisprudence. It is the golden chain, which connects the nations of the earth, and binds them together in the closest union. It comes home to every man's business and bosom, and is as captivating by the philosophy of its doctrines, as it is commendable for its sound morals, its flexible adap-

tations, and its enlightened policy. Much of its excellence, it must be admitted, is the growth of modern times. Its history may be easily traced back to the classical shores of the Mediterranean, where maritime enterprise upon the revival of letters spread itself with wonderful rapidity and success. It succeeded the age of chivalry; and by blending the common interests of nations, it softened the manners, and subdued the barbarous spirit of rivals and adversaries. The customs of trade and navigation soon acquired the authority of law; and assisted by the persuasive equity of the Roman law of contract, (then much studied and admired, and still entitled to profound admiration,) it silently pervaded all Europe, from the farther Calabria to the frozen Baltic. The *Consolato del Mare*, which still instructs us by the wisdom of his precepts, is but a collection of the rules and maxims of this voluntary international code. The celebrated Ordinance of Louis the Fourteenth (which will be gratefully remembered, when his ambitious projects shall be lost in the dimness of tradition,) is little more than a text gathered from the civilians, and the customs of commerce, by the genius of a minister, whose life seemed devoted to the interests of posterity. England was almost the last to receive into her bosom this beautiful effort of human reason. Little more than a century has elapsed, since she could scarcely be said to possess any commercial jurisprudence. The old common lawyers repelled it with a sullen inhospitality and indifference. And though it cannot be doubted, that the spirit of commerce would, first or last, have forced it into the courts of England, and compelled them to protect

the interests, which the enterprise of her subjects had created ; it may be reasonably questioned, whether, but for the extraordinary genius of Lord Mansfield, she would not have been, at this very moment, a century behind continental Europe in adopting its doctrines. He was in a great measure the author of the law of insurance ; and he gave to the other branches of commercial law, a clearness and certainty, which surprise us more and more, as we examine and study his decisions. That he borrowed much from foreign jurisprudence is admitted ; but he more than repaid every obligation to these sources. He naturalized the principles of commercial law, when he transplanted them into the soil of England, and they have flourished with new vigour in her genial climate. It is her just boast, that having been once a tributary, she has now in turn laid the whole Continent under contribution. Her commercial law has attained a perfection, order, and glory, which command the reverence of the whole world. It is almost universally followed and obeyed ; not, indeed, as of positive institution ; but as wisdom, practical wisdom, acting upon the results of a large experience, in a government, where opinion is free, and justice is administered without favour and without reproach.

A treatise upon this branch of law must necessarily comprehend a wide range of subjects. It must discuss, among other things, the law of principals and agents, brokers, factors, and consignees ; of partnerships, and other joint ownerships ; of negotiable instruments, such as bills of exchange, promissory notes, checks, and bills of lading ; of contracts of

bailment, shipments, and affreightment; and, as incidents, of charter-parties, freight, demurrage, and stoppage *in transitu*; of navigation and shipping, and, as incidents, the rights and duties of owners, masters, and mariners; and of insurance, bottomry, respondentia, salvage, and general average. My object will be to deal as fully with these topics, as may consist with the limits, by which every system of lectures must be circumscribed.

In the last place, the Constitutional Law of the United States. In the correct exposition of this subject, there is not a single American citizen, who has not deep stake and permanent interest. "In questions merely political," says Junius, "an honest man may stand neuter. But the laws and constitution are the general property of the subject. Not to defend is to relinquish; and who is so senseless as to renounce his share in a common benefit, unless he hopes to profit by a new division of the spoil?"* The existence of the union of these States, does, (as I think,) mainly depend upon a just administration of the powers and duties of the national government; upon the preservation of that nice, but ever changing influence, which balances the State and General Governments, and tends, or should always tend to bring them into a due equilibrium. There is no safety to our civil, religious, or political rights, except in this union. And it is scarcely too much to affirm, that the cause of liberty throughout the world is in no small measure suspended upon this great experiment of self-government by the people. I shall endeavour, in my commentaries upon

* Letter 41, to Lord Mansfield.

this important branch of political law, to discuss it with all the delicacy and reserve becoming my official station, and with all the sobriety appertaining to the fundamental law of organization of a free government. My object will be to unfold its divisions, and explain its principles, as far as practicable, by the lights of those great minds, which fostered into being, and nourished its infancy. I shall deal little with speculative discussions, and still less with my own personal opinions. But I shall rely with undoubting confidence upon the early commentaries of its framers, upon the legislative recognitions of authority and duty, and the judicial decisions of the highest courts, as safe guides for interpretation. Above all, I shall freely use the doctrines of the admirable production * of Hamilton, Madison, and Jay, (patriots as pure, and statesmen as wise, as any, which have graced our country,) which has already acquired the weight of an authority throughout America. If by such means I shall contribute to fix in the minds of American youth a more devout enthusiasm for the constitution of their country, a more sincere love of its principles, and a more firm determination to adhere to its actual provisions against the clamours of faction, and the restlessness of innovation, my humble labours will not be without some reward in the consciousness of having contributed something to the common weal.

I have thus sketched a general outline of the course of lectures, which the Founder of the Dane Professorship has in the first instance assigned to this

* The Federalist.

chair, for the encouragement of juridical learning. Imperfect as this outline is, it must strike the most superficial observer, how rich and various are the topics, which it proposes to examine; how extensive is the learning, and how exhausting the diligence, to accomplish the design. While it does honour to the public spirit, and the sagacity and enlightened zeal of the Founder; while it testifies his enthusiasm for the science, in which he has so deservedly attained eminence; it at the same time admonishes us, that he, who matured the plan, seems alone to possess the courage and ability to execute it with complete success. In truth, the venerable Founder has measured the strength of others by his own; and scarcely seems to have suspected the difficulties of the task, from the consciousness of his own power to subdue them. The skilful guide in the Alps walks with fearless confidence in the midst of dangers, which appal the traveller, who has never made trial of his strength. Lord Coke, himself a prodigy of professional learning, has somewhere laid down, for the benefit of students, the various employments for every day, and has assigned *six* hours for the pursuit of the law.* Lord Hale has limited his exactions to the same period; † and Sir William Jones, whose early ambition thought, that all the departments of law might be mastered by a single mind in satisfactory Commentaries, has not ventured upon a different assign-

* Co. Litt. 64 b.

“Sex horas somno, totidem des legibus æquis,
Quatuor orabis, des epulis duas.

Quod superest ultro sacris largire camænis.”

† Boswell's Life of Johnson, iii. 398.

ment of labour.* I feel justified in saying, that for more than fifty years our generous patron has daily devoted to his favourite studies of politics and jurisprudence more than double that number of hours.

I trust, it will not be deemed an intrusion, if upon this occasion I venture to speak somewhat of the public services of this distinguished lawyer, which are already matter of notoriety, and, considering his age and character, may almost be deemed matter of history.

It is now more than fifty years since Mr. Dane first came to the bar, and brought to its practice his varied stores of knowledge. He was almost immediately engaged in the duties of legislation in this, his native State; and to him we are chiefly indebted for the first general revisal of our Provincial Statutes, as well as for other improvements in our code of positive law. At the distance of thirty years, he was again called upon by the voice of the legislature to a similar duty; and to him, in a great measure, we owe the valuable collection of our Colonial and Provincial Statutes, which now adorns our libraries. In the intermediate period he served many years in the Continental Congress during some of its most difficult operations, and there maintained a high reputation for sound judgment, and an inflexible adherence to the best principles of political polity. His advancement to public life was always unsought for by himself; and his retirement from it has always

* Teignmouth's Life of Sir William Jones, p. 257.

“Six hours to law, to soothing slumber seven,
Ten to the world allot, and all to Heaven.”

See also, Law of Bailments, p. 122, 123.

been matter of public regret. To him belongs the glory of the formation of the celebrated Ordinance of 1787, which constitutes the fundamental law of the states northwest of the Ohio. It is a monument of political wisdom, and sententious skilfulness of expression. It was adopted unanimously by Congress, according to his original draught, with scarcely the alteration of a single word. After his retirement from public life, he devoted himself with matchless assiduity to the duties of the bar; and gradually arriving to the first rank, he became the guide, the friend, and the father of the profession in his own county. In the midst of an extensive practice, he found leisure to compile his Digest and Abridgment of American Law, which, in eight large octavo volumes, comprehends a general survey of all our jurisprudence, and attests the depth of his learning, his unwearied industry, and his independent, but cautious judgment. It is now some years since he bade farewell to the bar, but not to his favourite studies.* In contemplating his professional character one is perpetually reminded of the fine portrait of Lord Chief Justice Rolle, drawn by Lord Hale, in his preface to Rolle's Abridgment of the Law, which has so close a resemblance, that it seems another, and the same. "He argued frequently and pertinently," says Lord Hale; "his arguments were fitted to prove and evince, not for ostentation; plain, yet learned; short, if the nature of the business permit-

* At this very moment there is in the press a ninth supplementary volume by Mr. Dane to his Digest and Abridgment, which contains a full abstract of thirty volumes of Reports, published since his original work.

ted, yet perspicuous. His words few, but significant and weighty. His skill, judgment, and advice in points of law and pleading were sound and excellent.—In short, he was a person of great learning and experience in the common law, profound judgment, singular prudence, great moderation, justice, and integrity.” Mr. Dane has nobly dedicated the whole proceeds of his great work to the establishment of this professorship; and thus has become to our parent University, in the highest sense, the American Viner. I am but too sensible, that here the parallel must stop; and that to pursue it farther would cover with humiliation him, who now addresses you. To the liberal donation of Mr. Viner the world is indebted for the splendid Commentaries of Sir William Blackstone, a work of such singular exactness and perspicacity, of such finished purity and propriety of style, and of such varied research, and learned disquisition, and constitutional accuracy, that as a text-book it probably stands unrivalled in the literature of any other language, and is now studied as a classic in America, as well as in England. Perhaps when we are gathered in the dust, some future Blackstone, nursed and reared in this school, may arise, and by a similar achievement blend his own immortality with the fame of the Founder. Would to God, that it may be so! And thus this fair seat of science become the pride of the law, as it now is the pride of the literature of our country.

When we look around us, and consider, how much has been done by this University for the glory and safety of the Commonwealth; when we recollect, how many distinguished men have been nourished

in her bosom, and warmed by her bounty, and cheered by her praise ;* it is impossible to suppress the wish, the earnest wish, that this last triumph may yet crown her matron dignity. What consolation could be more affecting to her grateful children, than that in these academical shades their should arise—a temple, sacred to the majesty of the law, where our future orators, and jurists, and judges, and statesmen, might mature their genius, and deepen their learning, and purify their ambition. Where future generations may approach, and read the wisdom of the law, as it is personified in the glowing sketch of Algernon Sidney. “It is void of desire and fear, lust and anger. It is *mens sine affectu*, written reason, retaining some measure of the divine perfection. It does not enjoin that, which pleases a weak, frail man ; but without any regard to persons, commands that, which is good, and punishes evil in all, whether rich or poor, high or low. It is deaf, inexorable, inflexible.” †

* The members delegated from Massachusetts to serve in the Revolutionary Congress between 1774 and 1789, (when the new Constitution was adopted,) were in number twenty-one. Of these seventeen were educated in Harvard University. Their names are as follows : Samuel Adams, Thomas Cushing, John Hancock, John Adams, Robert T. Paine, Francis Dana, Elbridge Gerry, John Lowell, Samuel Osgood, Jonathan Jackson, Artemas Ward, George Partridge, Rufus King, James Lovell, Samuel A. Otis, George Thatcher, and Nathan Dane. Mr. Dane is the only survivor.

† Works of Algernon Sidney, sect. 15, p. 69.

